

## **Explanation of Grandfathering Provisions at Section 1.1(d)(ii) of the Mission**

We are writing to provide an explanation as requested regarding the grandfathering provisions that have been incorporated into the Mission section of the Bylaws.

Sidley, Adler, and ICANN Legal all support the items included within the grandfathering provisions for incorporation into the draft Bylaws.

First, there has been a question as to the propriety of referencing external agreements in the grandfathering provisions, because of the concerns earlier raised about housing definitions of ICANN's mission within external agreements. These do not raise the same issues when referred to in the grandfathering context. The Mission is not modified by these agreements.

### *(A)—Grandfathering of RA/RAAs*

- a. This item was the subject of substantial conversation within the CCWG and the attorneys agree that the language provided serves the proposal. The grandfathering (and subsequent renewal) of RA/RAA agreements was anticipated in the Proposal.
- b. These allow for ICANN to continue with its work and to not be required to breach existing agreements or have those agreements called into question.

*(B) any agreement, letter of intent, memorandum of understanding, agreement in principle, or other similar agreement between ICANN and the Address Supporting Organization (“ASO”), the Number Resource Organization (“NRO”), the IETF, or one or more RIRs in force on [October 1, 2016];*

*(C) any agreement, letter of intent, memorandum of understanding, agreement in principle, or other similar agreement between ICANN and a third party identified by ICANN relating to the root zone maintainer function (the “Root Zone Maintainer”), in force on [October 1, 2016];*

*(D) (D) the IANA Naming Function Contract between ICANN and PTI effective [October 1, 2016];*

*For items (B), (C) and (D):*

- a. Reference to agreements with the IAB, the ASO, PTI and the Root Zone Maintainer are there to create unambiguous ability for ICANN to perform and contract for that work to perform the IANA functions.
- b. All of these documents, as they relate to the performance of the IANA Functions, will be available either for public review or public comment prior to going into effect.

- c. They are included to affirm that ICANN's Mission is not violated through entering or performing those contracts. This is different from basing the entire definition of a particular aspect of the mission on an external document, which was proposed earlier.
- d. None are capable of unilateral ICANN amendment.
- e. All are arguably covered by the Mission statement already, but for avoidance of doubt, seemed important that ICANN is able to do the work that this transition is calling for it to do. This continuity of work that is, in fact, the end result of the transition should not be subject to collateral attack after the customers of the functions and the broader community have had the opportunity to review the agreements.

*(E)ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on [October 1, 2016];*

- a. Only the *existing* 5 year Strategic and Operating Plans are grandfathered, and as of the date identified in the Bylaws – this means that amendments to those plans happening later are *not* grandfathered in.
- b. They were developed through community consultative process, and are an important element in maintaining ICANN's historic mission, which is confirmed to be untouched in the Proposal.
- c. All work called for under these plans should be supported under the Mission in any event.
- d. Strategic and Operating Plan are *specifically excluded* from the renewal provision. No future 5-year plan is included here.

*(F)any renewals of agreements described in subsections (A)-(D) pursuant to their terms and conditions for renewal.*

- a. Renewal terms regarding the RA and the RAA have been the subject of substantial conversation within the CCWG and the attorneys agree that the language provided serves the proposal.
- b. In relation to the items at (B)(C) and (D), the allowance for renewal is provided to allow for ICANN to continue to provide (through contract, or directly, as appropriate) the IANA functions so long as the customers expect ICANN to serve in that role, as well as the continued policy/implementation related work that ICANN performs. As with the renewals of RAs and RAAs, the unambiguous ability to continue this work is essential to serving ICANN's mission. To the extent there are material modifications to those agreements to include new items that are believed to be outside of Mission, those new items are not intended to be excluded from scrutiny.